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Supreme Court, U.S.
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No. 95-1732

IN THE

Supreme Court of the United States

October Term, 1995

CITY OF PORTLAND

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit Oregon corporation, and NINA BELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 23, 1996

6 pp

QUESTION PRESENTED

Does the Clean Water Act ("CWA" or "Act") authorize citizens to enforce narrative (non-quantified) permit conditions?

LIST OF INTERESTED PARTIES

The parties are correctly identified in the caption. Craig N. Johnston is counsel of record for both respondents. David A. Bledsoe of Perkins Coie is also counsel for respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Northwest Environmental Advocates and Nina Bell (collectively "NWEA") respectfully urge this Court to deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Ninth Circuit's opinion in the case of Northwest Environmental Advocates v. City of Portland, No. 92-35044. The Court of Appeals' opinion is reported at 56 F.3d 979 (1995) ("NWEA II") and is reproduced in the Appendix to the petition at App-34. For the convenience of the Court, all citations to the opinion will be to the opinion attached to the petition.

STATEMENT OF THE CASE

Petitioner City of Portland ("Portland") annually discharges hundreds of millions of gallons of diluted raw sewage from its combined sewage and stormwater collection system into the Willamette River and the Columbia Slough; these "combined sewer overflow" ("CSO") discharges cause severe violations of water quality standards.

The relevant permits in this case have at all times prohibited discharges that violate water quality standards. Specifically, Portland's 1984 National Pollutant Discharge Elimination System ("NPDES") Permit provided as follows:

> Notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate water quality standards as adopted in OAR 340-41-455 except in the following defined mixing zone: The mixing zone shall consist of a 100 foot radius from the point of discharge.

Portland's 1991 Permit contains two separate provisions (one for each basin) regarding water quality standard compliance for the CSO discharges. Both provisions provide that:

> No wastes shall be discharged and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445.

The issue in this case involves the enforceability of these permit conditions. Most NPDES permits, like Portland's, contain no other mechanism for ensuring compliance with water quality standards.[1]

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT DECISION IS FULLY CONSISTENT WITH THE CLEAN WATER ACT AND THE DECISIONS OF OTHER CIRCUITS

This is a plain meaning case. As the Ninth Circuit noted, "[t]he plain language of [the Clean Water Act] CWA § 505 [33 U.S.C. § 1365] authorizes citizens to enforce all permit conditions." *NWEA II*, Petition at App-49. Section 505 does this by authorizing citizens to bring suit against persons alleged to be in violation of any "effluent standard or limitation under this chapter." The term "effluent standard or limitation" is used as a term of art in § 505. The term is defined in § 505(f), and includes "a permit or condition thereof issued under section 1342 of this title . . ." 33 U.S.C. § 1365(f)(6).[2] Because § 402 of the Act, 33 U.S.C. § 1342,

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[1] The United States Environmental Protection Agency ("EPA") has indicated its belief that all permits issued in Oregon, Arizona and California contain identical or similar prohibitions. Brief of the Environmental Protection Agency Supporting [Respondents'] Petition for Rehearing ("EPA Brief"), App-26. While EPA does not indicate how many of these permits also contain numeric, water quality-based permit conditions, most do not.

[2] This definition distinguishes the term "effluent standard or limitation" from the more limited term "effluent limitation," which is defined separately at 33 USC § 1362(11). *See, infra*, pp. 7-8.

establishes the NPDES permit program, the clear language of § 505(f)(6) provides that citizens may enforce NPDES permit conditions in citizen suits under § 505.[3]

This plain meaning must control absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the legislative history underscores the plain meaning of § 505(f)(6). Most significantly, as noted by the Ninth Circuit, the Senate Report accompanying the passage of the CWA in 1972 explained in unmistakable terms that "*in addition to violations of section 301(a)* [33 U.S.C. § 1311, Effluent Limitations], citizens are granted authority to bring enforcement actions for violation of . . . *any* condition of *any* permit issued under section 402." Federal Water Pollution Control Act Amendments of 1972, S.Rep. No. 414, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (emphasis added); *see also NWEA II*, Petition at App-51.

Moreover, as also noted by the Ninth Circuit, the case law provides ample support for the court's interpretation of the effect of § 505(f)(6). *NWEA II*, Petition at App-52. We will address *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900 (1994) (*Jefferson County*) below. At this point we note only that numerous courts have held that § 505(f)(6) grants citizens an unqualified power to enforce any and all NPDES permit conditions. *See NWEA II*, Petition at App-52-56 (and cases

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[3] The Environmental Protection Agency agrees with the Ninth Circuit's view of the plain meaning of § 505(f)(6). EPA Brief, App-23.

cited therein); *see also United States v. Louisiana-Pacific Corp., slip opinion*, Civ. Act. No. C 78-0567 (N.D. Cal. 1990) (reproduced in the Appendix at App-28-34) (granting the Environmental Protection Agency ("EPA") the right to enforce the same type of permit condition at issue in this case).

Notwithstanding the clear statutory language, legislative history and case law, Portland argues that the CWA excepts from the realm of enforceable permit conditions narrative conditions that require compliance with water quality standards. Portland does not identify any textual basis for this exception. Instead, it raises three arguments in urging the Court to grant its petition in this case. First, Portland argues that allowing for the enforcement of these narrative conditions would be inconsistent with the Act's differentiation between effluent limitations and water quality standards. Petition at 9-10. Second, Portland maintains that allowing for the enforcement of these conditions would constitute an unwarranted extension of federal jurisdiction. Petition at 11-17. Finally, Portland contends that the Ninth Circuit's decision abrogates the permit shield doctrine. Petition at 17-20.

NWEA will address each of these arguments in turn. We will then address the effect of *Jefferson County*.

A. The Clean Water Act Authorizes Both Numeric and Narrative Effluent Limitations

Portland argues that the permit conditions at issue in this case are not true "effluent limitations," and that therefore they should not be enforceable. This argument fails to consider two threshold issues. First, as noted above, § 505(f)(6) specifically defines enforceable effluent standards and limitations in citizen suits to include all permit conditions. As noted by the

Ninth Circuit, in applying this language "several courts have held that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations." *NWEA II*, Petition at App-56 and cases cited therein.

Second, citizen suits are not the proper forum for determining the validity or appropriateness of permit conditions. It is well established that only state courts may review the validity of state-issued NPDES permits. *See Shell Oil Co. v. Train*, 585 F.2d 408 (CA9 1978); *District of Columbia v. Schramm*, 631 F.2d 854, 863 (CADC 1980); *American Paper Institute, Inc. v. U.S.E.P.A.*, 890 F.2d 869, 875 (CA7 1989); and *Municipal Authority of the Borough of St. Mary's v. U.S.E.P.A.*, 945 F.2d 67, 71 (CA3 1991). Moreover, the time for such challenges is at the point of permit issuance. Under Oregon law, permits must be challenged, if at all, within 60 days of issuance. ORS 183.484(2).[4] By failing to challenge the permit at the point of issuance, Portland lost "forever the right to do so." *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 78 (CA3 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (involving a state-issued permit); *see also Texas Municipal Power Agency v. Administrator of the U.S.E.P.A.*, 836 F.2d 1482, 1484-85 (CA5 1988) (EPA-issued permit).

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[4] *See also* 33 USC § 1369(b)(1) and (2) (limiting challenges to EPA-issued NPDES permits to those filed in the appropriate Federal judicial district within 120 days of permit issuance, and specifically precluding the review of such conditions in enforcement actions).

Even if one were to assume the appropriateness of this inquiry, however, Portland misapprehends the concept of "effluent limitations." Section 502(11) of the CWA defines the phrase "effluent limitation" to mean "*any restriction* established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents ... including schedules of compliance." 33 U.S.C. § 1362(11) (emphasis added). This definition is broad enough to include narrative limitations. EPA has long construed it so, both in its permitting regulations and in the issuance of permits containing conditions just like those at issue in this case.[5] EPA's long-standing view is entitled to deference from this Court. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).[6]

The CWA contemplates two types of effluent limitations. First, § 301 requires the establishment of effluent limitations requiring compliance with specified technology-based requirements. *See, e.g.*, 33 U.S.C. § 1311(b)(1)(A) and (2)(A). Second, § 301(b)(1)(C) requires that all discharges meet more stringent limitations where necessary to comply with water quality standards.[7] It is the latter requirement that is at issue in this case. EPA's regulations confirm that limitations to assure compliance with water quality standards are proper by

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[5] *See* 40 C.F.R. § 122.44(k)(2) (1994); and *United States Steel Corp. v. Train*, 556 F.2d 822, 839-40 (CA7 1977) (upholding a similar condition).

[6] *See also* EPA Brief, App-23-24.

[7] *See also* Section 402(b), 33 USC § 1342(b), which requires the issuance of permits that ensure compliance with § 301.

precluding the issuance of any permit where its conditions cannot ensure compliance with water quality standards. 40 C.F.R. § 122.4(d). Further, 40 C.F.R. § 122.44(d) expands on this requirement by mandating that each permit control the discharge of pollutants that would cause, have the reasonable potential to cause, or contribute to the violation of any water quality standard. Thus, both the CWA and EPA's regulations mandate that NPDES permits compel compliance with water quality standards. *See also Arkansas v. Oklahoma*, 503 U.S. 91, 105-107 (1992) (upholding EPA's interpretation that NPDES permits must ensure compliance with the water quality standards of downstream states).

The permit conditions at issue in this case serve precisely the purpose of assuring compliance with water quality standards. The fact that they do so through a narrative prohibition does not render them illegal or unenforceable. As noted by EPA, "[n]othing in section 301 or elsewhere in the Act requires that such effluent limitations or permit conditions be expressed solely as end-of-pipe limitations." Brief of the Environmental Protection Agency Supporting [NWEA's] Petition for Rehearing ("EPA Brief"), pp. 10-11. To the contrary, "*any restriction*" is permissible. 33 U.S.C. § 1362(11) (emphasis added).

In *United States Steel Corp. v. Train*, 556 F.2d 822, 839-40 (CA7 1977) ("U.S. Steel"), the Seventh Circuit addressed a timely-filed challenge to a permit condition just like those at issue in this case. In *U.S. Steel*, the relevant condition precluded the discharger from causing the affected waters to violate Indiana's water quality standards for temperature. Noting that it knew of no other way to implement temperature-based standards, the Court of Appeals concluded

that '[b]ecause of the convenience of temperature limits, thermal water quality standards do not need to be 'translated' in order to become applicable to an individual discharger as effluent limitations." *Id.* at 840 fn. 27.

B. Congress Has Granted the Federal Courts Jurisdiction to Enforce Narrative, Water Quality-Based Permit Conditions

The CWA, its legislative history, and the relevant case law all indicate that § 505 grants citizens the authority to enforce any and all NPDES permit conditions, as noted above. Portland would have the Court create an unexpressed exception to § 505(f)(6) precluding the enforcement of narrative permit conditions. Portland relies chiefly on four cases, all of which are inapposite.

First, Portland asserts that the Ninth Circuit's opinion conflicts with *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (CA2 1993), which held that § 505 does not authorize citizens to enforce state-imposed permit conditions that are beyond the scope of the CWA. *Kodak* is in no way inconsistent with the Ninth Circuit's opinion. There is no credible argument to be made that conditions requiring compliance with water quality standards are beyond the scope of the CWA. The CWA and EPA's regulations expressly require such conditions. *See*, *supra* at pp. 5-8. Indeed, EPA utilizes permit conditions just like those at issue here. *See U.S. Steel*, 556 F.2d at 839-40. Further, EPA filed an *amicus* brief before the Ninth Circuit in this case supporting the establishment and enforceability of narrative, water quality-based permit conditions. EPA Brief, App-18-19, 22-27.

Portland next argues that the Ninth Circuit's opinion conflicts with *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (CA2 1984). *Hooker* involved the question whether citizens may intervene in actions brought by EPA, pursuant to § 504(a) of the CWA, 33 U.S.C. § 1364(a), to abate "imminent and substantial endangerment[s]." The Court of Appeals began with the correct assumption that the citizens could intervene only if they could have initiated the action themselves under § 505. *Hooker*, 749 F.2d at 978; *see also* 33 U.S.C. § 1365(b). In finding that the citizens could not have initiated the action themselves, however, the Second Circuit expressly relied on the fact that § 505(f) does not incorporate the "imminent and substantial endangerment" authority within the definition of enforceable "effluent standard[s] and limitation[s]." *Hooker*, 749 F.2d at 979. *Hooker* is clearly distinguishable from this case; here NWEA seeks to enforce permit conditions, which are expressly listed in § 505(f)(6) as being enforceable through citizen suits.

Third, Portland cites *American Paper Institute, Inc. v. Environmental Protection Agency*, 996 F.2d 346 (CADC 1993) ("*API*"), as allegedly indicating "that the intent of the Clean Water Act is to enforce water quality standards in citizen suits only through the effluent limitations established in each permit - not the wholesale incorporation of 'generic standards' relating to water quality." Petition at 15-16. This characterization is inaccurate. *API* involved a challenge to an EPA regulation requiring that NPDES permit writers translate narrative criteria addressing chemical pollutants (e.g., "no toxics in toxic amounts") into chemical-specific effluent limits. 996 F.2d at 350. Applying *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court of Appeals upheld the rule as a reasonable

means of assuring that NPDES permits ensure compliance with water quality standards. *API*, 996 F.2d at 351.

API at most stands for the proposition that EPA, as a matter of regulatory discretion, may require that permit-issuers translate certain narrative water quality criteria into chemical-specific limits in the permit issuance process. To date, EPA has chosen to assert this authority only with respect to chemical pollutants to implement the national water quality-based toxics control program. 54 Fed. Reg. 23868, 23871 (June 2, 1989). While both EPA and the Court of Appeals may view chemical-specific limits, where feasible, as the best means of implementing narrative criteria (and NWEA agrees), neither EPA nor the Court of Appeals suggests that this is the only lawful way through which water quality standards may be implemented. EPA's *amicus curiae* brief in this case specifically supports the enforceability of narrative, water quality-based permit conditions. EPA Brief, App-22-27.

There is good reason why EPA has not established an across-the-board requirement mandating numeric, end-of-pipe limits in all cases. As noted by the Ninth Circuit, "certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids)." NWEA II, Petition at App-57 (citations omitted). EPA's regulations explicitly contemplate the establishment of narrative criteria. 40 C.F.R. § 131.11(b)(2). If narrative permit conditions were unenforceable, many of these standards would be rendered meaningless. There is simply no indication that Congress intended such a result.

The need for narrative effluent limitations is particularly strong in the CSO context, where the inability to control the amount of flow that is discharged during storm events makes it infeasible to establish numeric, end-of-pipe limitations to implement even numeric water quality criteria. The Ninth Circuit explained this dynamic in the following terms:

> . . . Because the number and volume of overflow events from CSO systems are caused primarily by uncontrollable events--i.e., the amount of stormwater entering the system--regulators have no ready way of determining what portion of the flow in a given discharge event is sewage and what portion is rainwater. Without this information, it is impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.

NWEA II, Petition at App-59. As evidenced by the permit conditions in this case, in these circumstances permit-issuers rely on narrative permit conditions to ensure that the water quality-based requirements of the statute are met.[8] These conditions must be given meaning in the enforcement process.

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[8] *See also U.S. Steel*, 556 F.2d at 839-40 (CA7 1977) (recognizing that permit issuers may simply incorporate water quality

Finally, Portland cites *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (CA9 1987), for the proposition that it is not the water quality standards themselves that are enforceable under § 301(b)(1)(C) [33 U.S.C. § 1311(b)(1)(C)], but the permit conditions necessary to meet those standards. Petition at 16. NWEA agrees. *See also NWEA II*, Petition at App-56-57, n.11. However, in this case, unlike *Oregon*, NWEA is seeking to enforce permit conditions. As EPA has noted:

> EPA concurs with the premise that the statute does not require permittees to comply with water quality standards "directly," or in the absence of a permit condition imposing such a requirement. However, the permit at issue here contains such a condition. Thus, the principle set forth in the *Oregon* case is inapposite to the question of whether a permit expressly prohibiting discharges that violate state standards is valid and enforceable by citizens.

EPA Brief, App-24.

Thus, all four of the cases cited by Portland are simply red herrings. There is no conflict among the circuits, or within the Ninth Circuit, that pertains to this action.

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standards into permit conditions where end-of-pipe limits are infeasible).

C. The Permit Shield Doctrine Supports the Enforceability of All Permit Conditions

Section 402(k) of the CWA establishes the bedrock principle that, with minor exceptions, permittees are to be judged by the standards of the permits under which their discharges are authorized. Specifically,

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health....

33 U.S.C. § 1342(k). The effect of this provision is simple: the permit is the measuring stick against which a permittee's compliance status is to be determined. By contrast, permittees are not to be judged according to requirements that were omitted from their permits or were promulgated after their permits were issued. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). In short, compliance with the permit is what matters.

NWEA seeks only to have Portland judged by the standards of its permits--nothing more and nothing less. This notion is fully consistent with § 402(k). In this case, each of the relevant permits contains a clear provision requiring that all discharges conform with water quality standards. The 1991 permit contains two separate water quality-based conditions (one for each basin) specifically relating to the CSO

discharges. Portland seeks to turn § 402(k) on its head, however, by arguing that it somehow shields Portland from complying with these conditions. Portland wants the permit shield doctrine to make the permit mean less than what it says. The Court should not condone this blatant rewriting of § 402(k) and the relevant permits.

Portland's reliance on EPA's "permit as a shield" policy is misplaced. The provisions that Portland quotes state a principle not applicable to this case: that the permit shield applies where a permittee has identified pollutants present in its discharge stream for which the permit-issuer ultimately declines to establish limitations. Petition at 18-19. That principle simply has no bearing where, as here, the authorization of relevant discharges is expressly conditioned on the requirement that they not cause water quality standard violations.

II. JEFFERSON COUNTY SUPPORTS THE NINTH CIRCUIT'S DECISION

The Ninth Circuit characterized *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, _____ U.S. _____, 114 S. Ct. 1900 (1994), as holding that the CWA "allows States to enforce the broad narrative criteria contained in water quality standards." *NWEA II*, Petition at App-52. Portland objects to the Ninth Circuit's characterization, arguing that *Jefferson County* stands only for the proposition that States may condition water quality certifications under § 401 of the Act, 33 U.S.C. § 1341, on requirements relating to the maintenance of stream flow where necessary to protect "designated uses." Petition at 20-21. Portland also stresses Judge Kleinfeld's language from his dissenting opinion in *NWEA II* to the effect that *Jefferson County* "does not involve

a citizens' suit, says nothing about citizens' suits, and implied nothing about citizens' suits." *Id.* at 20 (quoting from *NWEA II*, Petition at App-62 (Kleinfeld dissenting)). NWEA agrees that *Jefferson County* involved a state's enforcement of designated uses under § 401, and also that it did not directly speak to citizen enforcement under § 505. Nonetheless, the decision is relevant to the case at bar.

In *Jefferson County*, the petitioners argued that designated uses are too vague to be enforceable under § 401 of the Act. After first noting that "EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria[]," this Court addressed the vagueness argument in the following terms:

> Petitioners also appear to argue that use requirements are too open-ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria themselves. . . .
>
> . . . We think petitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that *the Act permits enforcement of broad, narrative criteria* based on, for example, "aesthetics."

Jefferson County, 114 S. Ct. at 1911 (emphasis added). This Court further noted the impact that the petitioners' interpretation would have on the implementation of the Act:

> Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

Jefferson County, 114 S. Ct. at 1912.

The thrust of Portland's argument in this case is very similar to that advanced by the petitioners in *Jefferson County* – *i.e.*, that narrative permit conditions requiring compliance with water quality standards are too vague to be enforceable. As the Ninth Circuit noted, however, "interpreting § 505 to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations" would "immunize the entire body of qualitative regulations from an important enforcement tool." NWEA II, Petition at App-58.

In *Jefferson County*, this Court indicated its reluctance to interpret the CWA in a manner that would frustrate the achievement of its water quality-based requirements. 114 S. Ct. at 1912. The Ninth Circuit did not view itself as bound by the *Jefferson County* decision; it expressly recognized that the two cases involved different statutory dynamics. *NWEA II*, Petition at App-55. Instead, the Ninth Circuit simply applied

the reasoning of *Jefferson County* to the similar issues presented in this case. After noting the difficulties both of establishing numeric, end-of-pipe limits to ensure compliance with narrative criteria and even of implementing numeric criteria where it is infeasible to control the amount of flow, the Ninth Circuit properly concluded that the teaching of *Jefferson County* counseled a similar result in the case before it. This Court should support that decision.[9]

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[9] To the extent that Portland seeks to distinguish *Jefferson County* because it involved State and not citizen enforcement, it is enough to point out that nothing in either the CWA or its legislative history suggests that citizens are to be more limited than EPA or the states with respect to the types of permit conditions they are entitled to enforce. *Compare* § 309(d) (allowing EPA to seek civil penalties for violation of permit conditions) and § 505(f)(6) (authorizing citizens to enforce permit conditions); *see also NWEA II*, Petition at 55 (noting that citizens may enforce the same permit conditions that States may enforce).

III. CONCLUSION

For these reasons, NWEA respectfully requests that the Court deny Portland's writ of certiorari.

Respectfully submitted this 23rd day of May, 1996.

Respectfully submitted,

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§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No

license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the

case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will

violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the

request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

UNITED STATES CODE
TITLE 33
SECTION 1362

Section 1362. Definitions

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

UNITED STATES CODE
TITLE 33
SECTION 1364

Section 1364. Emergency powers

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

40 CODE OF FEDERAL REGULATIONS
SECTION 122.4(d)

Section 122.4. Prohibitions (applicable to State NPDES programs, *see* § 123.25).

No permit may be issued:

* * *

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

40 CODE OF FEDERAL REGULATIONS SECTION 122.44 (d)(1)(i)

Section 122.44(d)(1)(i).

(d) *Water quality standards and State requirements*: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

40 CODE OF FEDERAL REGULATIONS SECTION 131.11(b)(2)

Section 131.11(b)(2) Criteria.

(b) Form of criteria. In establishing criteria, States should:

* * *

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criterial cannot be established or to supplement numerical criteria.

OREGON REVISED STATUTES

Section 183.484(2)

* * *

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

Docket No. 92-35044

In the

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES, a Non-Profit Oregon corporation, and NINA BELL,

Appellants,

v.

CITY OF PORTLAND,

Appellee.

BRIEF OF THE ENVIRONMENTAL PROTECTION AGENCY SUPPORTING THE PETITION FOR REHEARING/ SUGGESTION FOR REHEARING EN BANC

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BRIEF OF THE ENVIRONMENTAL PROTECTION AGENCY SUPPORTING THE PETITION FOR REHEARING/ SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 35 of this Court, the United States of America submits this memorandum in support of appellant's Petition For Rehearing With Suggestion For Rehearing En Banc of the decision (Addendum I hereto), issued on December 10, 1993 by a panel consisting of Circuit Judges Kleinfeld and Pregerson and District Judge Ingram.

We express a belief that this appeal involves a question of exceptional importance: may citizens enforce a condition in a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to the Clean Water Act ("the Act") that requires the permittee to ensure that discharges do not cause receiving waters to violate state water quality standards?

The United States has a direct interest in the development of the law regarding citizen enforcement of the Act because citizens play a crucial role in Clean Water Act enforcement. The panel decision hinged upon the panel's conclusion that permit conditions prohibiting discharges that violate water quality standards can be enforced by citizens only if they are expressed as end-of-the-pipe effluent limitations. EPA and states commonly include permit conditions prohibiting discharges that cause violations of state water quality standards using language similar to that employed here, particularly when regulating stormwater discharges or combined sewer and stormwater overflows ("CSOs"). Because citizen enforcement provides a crucial supplement to state and federal enforcement, the panel decision threatens to undermine severely an important source for enforcement of a proper, commonly used permit condition.

STATUTORY SCHEME

The Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 et seq., is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The Act prohibits the discharge of any pollutant from any point source into the nation's waters unless the discharge complies with the Act's requirements. 33 U.S.C. §§ 1311(a), 1362(12). For most dischargers, compliance is achieved by obtaining and adhering to the terms of an NPDES permit

pursuant to section 402 of the Act. 33 U.S.C. § 1342. See EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976).

Because Congress intended that "states should play the leading role in implementing the NPDES [program]," American Paper Inst. v. EPA, 890 F.2d 869, 873 (7th Cir. 1989) (footnote omitted), EPA has granted 40 states, including Oregon, authority to issue NPDES permits. See 33 U.S.C. § 1342(b). In authorized states, NPDES permits are issued by the appropriate state agency, subject to EPA review. 33 U.S.C. § 1342(d). A final state-issued permit is subject to judicial review in state court, with the state, not EPA, defending the permit decision and terms. See American Paper Inst. v. EPA, 890 F.2d at 874-75. Under Oregon law, NPDES permits must be challenged within 60 days of issuance. Or. Rev. Stat. § 183.484(2) (1991).

NPDES permits must include conditions ensuring that the discharge complies with the substantive provisions of the Act. 33 U.S.C. § 1342(a)(2). In particular, all NPDES permits must contain the more stringent of: (1) technology-based effluent limitations which reflect the pollution reduction achievable based on several levels of pollution control or process changes, without reference to the effect on the receiving water; or (2) effluent limitations representing that level of control necessary to ensure that the receiving waters attain and maintain state water quality standards. 33 U.S.C. § 1311(b), 1313(c).

Technology-based effluent limitations are usually based upon guidelines promulgated by EPA, and are restrictions on the quantities, rates, and concentrations of specified pollutants. See 33 U.S.C. § 1311, 1314. The guidelines, and the corresponding effluent limitations, are based upon the levels of control that can be achieved by application of the best

available technology economically achievable, and define permissible levels of discharges.[10] 33 U.S.C. § 1311.

Water quality standards under the Act consist of two principal elements: (1) a designated "use"[11] of waters consistent with the goals of the Act as set forth in 33 U.S.C. § 1251(a)(2); see 40 C.F.R. § 130.3; and (2) "criteria" specifying the amounts of various pollutants that may be present in those waters without impairing the designated uses, expressed in numerical concentration limits or in narrative form. 33 U.S.C. § 1313(c)(2)(A). States are also required to adopt an antidegradation policy which, among other things, mandates that existing uses of waters be maintained, as well as the level of water quality necessary to maintain those existing uses. 40 C.F.R. § 131.6

States are required by section 303 to adopt water quality standards, subject to EPA approval. 33 U.S.C. § 1313(c)(3). If a state does not adopt a water quality standard, EPA is required to adopt such standards for the state. Id. In accordance with this provision, Oregon has adopted water quality standards applicable to the waters and pollutants that are the subject of the citizen suit.

Water quality-based permit effluent limitations are unlike technology-based effluent limitations in that they are formulated without regard to technological capacity to restrict harmful discharges. Water quality-based effluent limitations

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[10] While effluent limitation guidelines and corresponding effluent limitations generally are expressed as numeric concentrations of specific pollutants, such guidelines may also include narrative restrictions. See, e.g. 40 C.F.R. § 435.13 note 4; amendment to § 435.13, 58 Fed. Reg. 12506 (March 4, 1993).

[11] Designated uses of the water may include, for example, public water supply, recreation, propagation of fish, and agriculture.

are designed to ensure that the discharge will not cause or contribute to violations of state standards. 33 U.S.C. § 1311(b)(1)(C). As with technology-based effluent limitations, two types of water quality based limitations may be written into permits. The first type contains numeric limitations on the quantities, rates, and concentrations of specified substances that are discharged, and is generally expressed using end-of-the-pipe limitations.

The second type provides narrative limitations. One common example of this type of limitation is a condition prohibiting discharges that cause or contribute to violations of state water quality standards.[12] The permit condition at issue in this appeal falls within this latter category.

The Act authorizes citizen plaintiffs to enforce permit conditions. The citizen suit provision, section 505, provides that citizen plaintiffs may enforce "an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). This section defines "effluent standard or limitation" as, inter alia, "a permit or condition thereof issued under section 1342." 33 U.S.C. § 1365(a)(1) and (f)(6).

The enforcement section of the Act, 33 U.S.C. § 1319(d), authorizes imposition of civil penalties for violations of "any permit condition or limitation" implementing the Act's substantive provisions. The Act defines "effluent limitation"

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[12] EPA's NPDES permitting regulations recognize that effluent limitations need not be either numeric or end-of-pipe limitations. See, e.g. 40 CFR 122.44(k) (authorizing permit conditions relating to the use of best management practices in addition to, or in lieu of, numeric limitations); 40 CFR 440 (addressing best management practices for mines). Best management practices include, for example, operating procedures or practices to control plant site runoff, spillage or leaks that would pollute surface waters. 40 CFR § 122.2.

as "any restriction established by a State or the Administrator" on quantities, discharge rates and concentrations of a pollutant discharged into a water of the United States. 33 U.S.C. § 1362(11).

STATEMENT

Nature of the Case, Course of Proceedings and Summary.

From 1984 to August 1991, the City of Portland ("the City") operated a sewage treatment plant under an Oregon NPDES permit issued in 1984. Northwest Environmental Advocates et al. v. City of Portland, No. 91-339-PA, slip op. at 4 (D. Or. Dec. 13, 1991) ("opinion below"). The City's antiquated sewage and stormwater systems were combined and regularly discharged storm water and sewage from approximately forty overflow outlets into the Willamette River and Columbia Slough, a tributary of the Willamette River. Id. at 2-3. In 1990, the City began to negotiate with the State concerning the permit that would replace the expiring 1984 permit. Id. at 4. The State sought to include a schedule in the new permit by which the City would eliminate the combined sewer overflows, (CSOs), but the City complained that it could not accomplish this in the five-year time period contemplated by the permit. Id. In August 1991, the State and the City finalized a stipulation under which the City would have twenty years to eliminate the CSOs. Id. at 5.

In March 1991, while the negotiations were pending, the citizens group, Northwest Environmental Advocates and its executive director, Nina Bell ("the citizens"), brought this suit under the Act's citizen suit provision, 33 U.S.C. § 1365. The citizens' complaint alleged that the 1984 permit covered only discharges from the City's sewage treatment plant, not from the CSOs, and the CSOs were thus unpermitted discharges. Id. at 5. The citizens also alleged that even if the CSOs were

covered by the 1984 permit, that permit contained a condition prohibiting the discharges from violating state water quality standards, and this condition was violated. Id. at 12-13.[13] The citizens argued that the citizen suit provision, section 505(a), authorizes citizen plaintiffs to enforce permits or conditions thereof. Id. at 15. See 33 U.S.C. § 1365(a)(1) and (f)(6).

The district court interpreted the City's permit and held that the City's CSO discharges were authorized by the 1984 permit. Decision below at 12. The court also held that although the 1984 permit referred to the Oregon water quality standards, it did not incorporate an enforceable condition because the "mere reference to water quality standards" in a permit does constitute an effluent standard or limitation for purposes of section 505. Id. at 15-16

The Ninth Circuit's panel decision upheld as "not clearly erroneous" the district court's first holding that the permit covered the CSOs. Panel Opinion ("Opinion") at 13915. The panel also affirmed the district court's holding that the citizens could not enforce the permit's requirement that discharges not violate water quality standards, concluding that because the citizens did not allege that the City violated end-of-pipe limitations designed to achieve water quality standards, the citizens lacked standing under section 505. Id. at 13920. The panel stated that "it is the duty of the permit-issuing authority to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met." Id. at 13920 (emphasis in original). In making the statement that end-of-pipe limitations are required, the panel did not rely upon

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[13] The 1984 permit stated "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards of Oregon. Id. at 14.

explicit statutory language.[14] Indeed, the panel noted that section 505, 33 U.S.C. § 1365, the citizen suit provision, provides that citizens may enforce "an effluent standard or limitation," and that the section broadly defines "effluent standard or limitation" as, inter alia, "a permit or condition thereof issued under section 1342." Opinion at 13919-20, (citing 33 U.S.C. § 1365(a)(1) and (f)(6)). However, the panel relied upon legislative history to disregard this statutory language, claiming that Congress did not intend the "limitless grant of jurisdiction" connoted by section 1365. Opinion at 13921-24.

As the panel noted, legislative history reveals that before the 1972 amendments to the Act, the statute did not require permits or mandate any effluent limitations, end-of-pipe or otherwise, but rather relied solely upon enforcement of state water quality standards. Id. Because enforcement of water quality standards was "almost non-existent," Congress developed the current approach whereby technology-based effluent limitations are written into easily enforced permits. Id. The panel emphasized that because Congress viewed effluent limitations in permits as superior to the pre-1972 enforcement scheme, it must not have intended to allow citizen enforcement of permit conditions prohibiting discharges in violation of state standards in the absence of end-of-pipe limitations. Id. at 13921-25.

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[14] As the panel noted, its opinion was the first court of appeals decision addressing the enforceability of a permit condition requiring that the permittee's discharges not violate state standards. Opinion at 13917.

ARGUMENT

A. Permit Conditions Based Upon the Effect Discharges May Have Upon Receiving Waters Are Valid and Enforceable by Citizens.

a. Underlying the panel's holding that the permit condition is unenforceable by citizens was the conclusion that permit writers must incorporate end-of-pipe limitations. Id. at 13920. The plain language of the Act demonstrates that the Portland permit condition, expressed in terms of the effect that discharges may have upon receiving water, is a legal, enforceable effluent limitation.

Section 301(b)(1)(C) mandates that point sources be subject to effluent limitations necessary to ensure that state water quality standards are not violated. 33 U.S.C. § 1311(b)(1)(C); See Trustees of Alaska v. EPA, 749 F.2d 549, 557 (9th Cir. 1984). Section 402 authorizes states and EPA to issue permits insuring compliance with section 301, 33 U.S.C. § 1311. 33 U.S.C. § 1342.[15] Nothing in section 301 or elsewhere in the Act requires that such effluent limitations or permit conditions be expressed solely as end-of-pipe limitations.

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[15] As the panel noted, section 402 authorizes permits ensuring compliance with 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318 and 1343. Slip op. at 13920. However, the panel inaccurately cited section 402(b)(1)(C) and 402(b)(2)(A) for this proposition; it is section 402(b)(1)(A) that requires that state permits ensure compliance with sections 1311, 1312, 1316, 1317 and 1343. 33 U.S.C. § 1342(b)(1)(A). Section 402(b)(2)(A) requires that state permits ensure compliance with section 1318. 33 U.S.C. § 1342(b)(2)(A). Section 402(a)(1) sets forth this requirement for permits that EPA issues. 33 U.S.C. § 1342(a)(1).

Moreover, the citizen suit provision, section 505, authorizes citizens to enforce "effluent limitations" and provides a definition for that term as it is used within that section. This definition provides that "effluent limitation" is a "permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter." 33 U.S.C. 1365(f)(6). Because this section unequivocally authorizes citizens to enforce conditions in permits issued by states or EPA pursuant to section 402, the panel was incorrect in holding that the citizens could not enforce the condition.

The conclusion that Congress did not intend to restrict effluent limitations to end-of-pipe limitations is confirmed by the definition of "effluent limitation" found in section 502(11), 33 U.S.C. §§ 1362(11). This definition governs the use of the term "effluent limitation" as generally used in the Act. The definition states that "effluent limitation" means:

> any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). This definition encompasses any restriction upon the nature of permitted discharges, and therefore encompasses conditions based upon the discharge's effect upon receiving waters. The requirement in Portland's permit that discharges not violate state standards restricts what the City may discharge, and expresses that restriction in term of the effect the discharges have upon receiving waters. Thus, the permit condition constitutes a restriction under section 502(11).

The panel opinion failed to address this clear statutory evidence. Rather, the opinion summarized these statutory provisions, and then set forth the whole of the panel's analysis of these provisions:

> None of these sections, however, require [sic] that a permittee directly comply with water quality standards. Rather, it is the duty of the permit-issuing authority to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met. See Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987).

Opinion at 13920 (emphasis in original). The Oregon case cited by the panel held that water quality standards are not imposed in the absence of a permit condition. Oregon Natural Resources Council v. United States Forest Service, 834 F.2d at 850. EPA concurs with the premise that the statute does not require permittees to comply with water quality standards "directly," or in the absence of a permit condition imposing such a requirement. However, the permit at issue here contains such a condition. Thus, the principle set forth in the Oregon case is inapposite to the question of whether a permit expressly prohibiting discharges that violate state standards is valid and enforceable by citizens. None of the statutory provisions considered by the panel support the conclusion that a permit is not enforceable by citizens unless it incorporates end-of-pipe limitations.

Moreover, the last time the Act was amended, Congress gave increasing prominence to state water quality standards. In 1987 Congress amended section 303(c)(2)(B) to require states to adopt numeric criteria for certain toxic pollutants that

are expected to impede attainment of state standards. Water Quality Act of 1987, Pub. L. No. 100-4, § 308(d), 101 Stat. 39. See also page 3, supra. Congress also amended section 304 to require that states (1) identify water bodies that are not expected to attain state water quality standards due to discharges of toxic pollutants and (2) develop strategies for reducing the discharge of the relevant toxic pollutants. Pub. L. No. 100-4, 308(a), 101 Stat. 39; see 33 U.S.C. 1314(1). The Act thus casts state standards in a central role, and provides broad authority for states to impose and citizens to enforce permit conditions that implement those standards.[16]

b. In light of clear statutory language, the panel need not have considered legislative history. In re Perroton, 958 F.2d 889, 893 (9th Cir. 1992) ("If the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent rare and exceptional circumstances."). However, the panel also erred in its assessment of the legislative history; the panel read into the history an ambiguity which cannot fairly be found, and then relied upon that ambiguity to disregard clear statutory language.

The panel opinion recognized that when amending the Act Congress sought to employ end-of-pipe limitations in order to enhance the pre-1972 system of enforcement of water

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[16] Additionally, it was improper for the district court to have reviewed the validity of the permit condition because there is no federal judicial review of any aspect of state-issued permits. See American Paper Institute, Inc. v. EPA, 890 F.2d 869, 874 (7th Cir. 1989); District of Columbia v. Schramm, 631 F.2d 854, 862-63 (D.C. Cir. 1980); Natural Resources Defense Council v. Outboard Marine, 702 F. Supp. 690, 694 (N.D. Ill. 1988); Under state law governing issuance of the state permit, NPDES permittees must challenge permits within 60 days of issuance. Or. Rev. Stat. § 183.484(2) (1991).

quality standards. Opinion at 13921-22. The panel stated that the legislative history is ambiguous, and supports both sides of the argument concerning whether citizens may enforce the permit condition at issue. Id. However, the panel concluded that because Congress viewed end-of-pipe limitations as superior, it intended to preclude citizen enforcement of state standards in the absence of such limitations. Id. at 13921-24.

Yet it cannot be assumed absent express congressional direction that Congress intended that end-of-pipe limitations become the exclusive means by which water quality standards may be achieved. As Judge Pregerson noted in his dissenting opinion, legislative history does not support the interpretation that Congress intended to restrict citizen enforcement to end-of-pipe limitations. Opinion at 13927 (emphasis in original). Indeed, the panel does not point to any legislative history so indicating. The history upon which the majority relies reflects Congress' intent to, in Judge Pregerson words, "improve enforcement, not to supplant the old system." Id.

Legislative history is consistent with the broad language in sections 402 and 502 concerning permit limitations that may be used to achieve state standards. See pages 10-12, supra. Similarly, the desire to enhance enforcement revealed in legislative history is reflected in the section 1365(f)(6) mandate that citizens may enforce any such permit condition. Id. The panel improperly failed to give effect to the Act's clear language.

The practical implications of the panel opinion are severe. It is EPA's understanding that all NPDES permits in the state of Oregon contain the condition at issue here, and all permits issued by Arizona and California contain similar prohibitions against exceeding water quality standards. Because citizen enforcement of NPDES permits provides an essential supplement to governmental enforcement, the panel opinion

threatens to greatly hinder Clean Water Act regulation in those three states.

For the foregoing reasons, Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc should be granted.

Respectfully Submitted,

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/s/
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Nos. C 78-0567 MHP and C 89-1738 MHP

In the

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION,

Defendant.

SURFRIDER FOUNDATION,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION and
SIMPSON PAPER COMPANY,

Defendants.

OPINION

Defendants, Simpson Paper Company ("Simpson") and Louisiana-Pacific Corporation ("L-P") (collectively, "the Mills" or "the Companies"), discharge effluent into the Pacific Ocean under National Pollutant Discharge Elimination System ("NPDES") permits issued on July 13, 1987 by the Environmental Protection Agency ("EPA") Regional Administrator pursuant to section 301(m) of the Clean Water Act. 33 U.S.C. § 1311(m)(l)(F). Plaintiffs, the United States and the Surfrider Foundation, allege that defendants have consistently violated the limits for chronic toxicity set under those permits and seek, inter alia, injunctive relief and penalties for the violations. The parties are now before the court on defendants' motion to dismiss certain claims in the Amended Complaint in Intervention and the Amended Supplemental Complaint. Having considered the papers submitted and the arguments of the parties, for the following reasons, the court grants in part and denies in part defendants' motion.

BACKGROUND

The background of the underlying action is set out fully in this court's order of June 14, 1990 and will not be repeated here. The parties have now come to the court on defendants' motion to dismiss claims of the amended complaints which were filed earlier this year.

Defendants present three issues for the court's consideration: (1) whether plaintiffs can seek enforcement of certain permit conditions based on alleged violations of receiving water limitations; (2) whether plaintiffs can be redressed for violations of an administrative order prior to the time the order was issued; and (3) whether plaintiffs can

compel compliance with a discharge limitation whose status is unclear at present.[17]

DISCUSSION

A. Violations of Water Quality Standards

Defendants argue that the penalties sought by plaintiffs for violations of effluent limitations exceed the scope of section 309(d) of the Clean Water Act. Plaintiffs argue that defendants' resistance is in fact a protest of a permit condition and, as such, defendants are barred from raising the issue in this court because they have not exhausted their administrative remedies. Defendants counter that, whether or not they exhausted their administrative remedies, the penalties sought by the government are outside the purview of the statute, therefore depriving this court of jurisdiction to hear those claims.

The court would only be deprived of jurisdiction if section 309 did not provide for imposition of penalties for violations of water quality standards. On its face, section 309 states that civil penalties may be imposed for violations of "any permit condition or limitation . . . ." 33 U.S.C. 1319(d) (emphasis added). As the water quality standards at issue have been explicitly stated in defendants' NPDES permit, there is nothing to suggest that they are not exactly the type of conditions to which section 309 refers.

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[17] Specifically, defendants want the court to dismiss the seventh, eighth, ninth and tenth claims for relief in the Amended Complaint in Intervention against Simpson Paper Company and paragraph 25 of the second claim, as well as the eighth, ninth, tenth and eleventh claims for relief in the Amended Supplemental Complaint against Louisiana-Pacific Corporation.

Defendants' attempt to create a distinction between contesting permit conditions and contesting the enforcement of conditions in their permit is unavailing. If defendants believed that these standards were impermissibly vague and therefore unenforceable, they could have appealed them to the EPA.

Nor is defendants' citation to 40 C.F.R. § 122.45(d) persuasive. Although this section does suggest that permit water quality standards for continuous discharges should be reduced to numerical limitations if practicable, a determination of whether said standards should have been reduced rather than stated in narrative terms is properly addressed to the agency during the permit stage. The sole question now before the court on the narrative conditions is whether plaintiff can establish with sufficient scientific accuracy that the conditions have been violated. This is a matter of proof and the subject of expert testimony.

Finally, the cases and statutes cited by defendants do not support their proposition that narrative standards cannot be enforced in addition to numerical limitations. See, e.g., EPA v. Water Resources Control Bd., 426 U.S. 200, 205 n.12 ("Water quality standards are retained as a supplementary basis for effluent limitations"); Sierra Club v. Union Oil of California, 813 F.2d 1480, 1483 (9th Cir. 1987) (same), vacated on other grounds, 485 U.S. 931 (1988); Trustees for Alaska v. EPA, 749 F.2d 549, 557 (9th Cir. 1984) (numerical limitations needed in addition to water quality standards where water quality standards must be translated); Oregon Natural Resource Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (no NPDES permit). Accordingly, defendants' motion to dismiss these claims is denied.

B. Violations of EPA Order

The United States has asserted that during the period October 1987 to November 19, 1988, defendants violated an EPA order requiring defendants to monitor the chronic toxicity of their discharges using a certain sea urchin protocol. However, plaintiffs have now conceded that because the EPA order was not entered until September 20, 1988, they are not entitled to relief for alleged violations which occurred prior to the entry of the order. Therefore, the United States has stipulated that its tenth claim for relief in the Amended Complaint in Intervention against Simpson and its eleventh claim for relief in the Amended Supplemental Complaint against L-P may be dismissed to the extent that plaintiffs seek penalties for the period from October 1987 to September 20, 1988. Accordingly, those claims are DISMISSED except as to the period beginning September 20, 1988.

C. Water Treatment Plant Limitations

The Amended Supplemental Complaint against L-P charges the company with violating "the limit on total suspended solids applicable to its water treatment works." See Amended Supp. Cmplt. at par. 25. L-P's NPDES permit required L-P to remove seventy five percent of the total suspended solids taken into its water treatment plant before discharging the wastewater into the Pacific Ocean. However, the permit also provided that if L-P's request for an exception then pending in front of the State Water Resources Control Board's were granted, the alternative limit chosen would automatically apply.

On November 17, 1987 L-P's request for an exception was approved. The State Water Resources Control Board's resolution deleted the removal requirement without imposing an alternative limit. Defendant argues, therefore, that there is

currently no requirement to be enforced and that the Government's second claim for relief should be dismissed.[18]

As both parties note, however, in response to citizen group challenges of the exemption provision, the EPA Chief Judicial Officer found the automatic exemption provision to be "a troublesome feature of the permits that allows circumvention of applicable public participation procedures" legislated in 40 C.F.R. part 124. See Ex. F. to Smith Dec.

Furthermore, L-P has filed a request for clarification of the Chief Judicial Officer's ruling and, in response to the ruling, EPA Region 9 has initiated permit modification proceedings. L-P's request questions whether the intent of the Chief Judicial Officer's Order was to invalidate the automatic modification provision from the date it was issued, hence prohibiting it from coming into effect.

The Chief Judicial Officer's response should clarify for which periods of time the removal requirement has been in effect. Accordingly, the court denies defendants' motion to dismiss the second claim without prejudice to renew it after the Chief Judicial Officer responds to the request for clarification.

CONCLUSION

As set out above, the court GRANTS IN PART and DENIES IN PART defendants' motion to dismiss.

IT IS SO ORDERED.

Dated: [SEP 26, 1990] /s/

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[18] Defendants' severability argument raised in their reply brief is completely unpersuasive.

MARILYN HALL PATEL
United States District Judge